Jerry Durham Drywall, d/b/a J & S Drywall *and* International Brotherhood of Painters & Allied Trades, Local 203. Case 17–CA–13354

May 24, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On March 1, 1989, Administrative Law Judge William A. Pope II issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief in support of the cross-exceptions and in answer to the Respondent's exceptions. The Respondent also filed an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

We agree with the judge that the complaint is not barred by Section 10(b) because we find that the Respondent did not, more than 6 months before the Union's filing of the unfair labor practice charge, expressly repudiate the contract in clear and unequivocal terms. *A & L Underground*, 302 NLRB 467, 468 (1991). The Respondent's violations of its contractual and statutory obligations before that time appeared, rather, to take the form of failures to comply with the contractual terms.

The judge made no specific finding on this issue because he decided this case before issuance of our decision in *A & L Underground*, when Board precedent could arguably be read as making it immaterial, for purposes of deciding the 10(b) limitations issue, whether a party had clearly repudiated an agreement more than 6 months before the filing of a charge alleging unlawful breaches or repudiation of that agreement. We see no need, however, to remand for such a finding. Contrary to the Respondent's submission, even if we consider what the Respondent claims is an admission by James Alderson, the business agent of the Charging Party Union, the record does not establish that a sufficiently clear repudiation occurred outside the 10(b) period to bar litigation of the charges on which the complaint was issued.

The Respondent essentially relies on Alderson's affirmative answer, on cross-examination, to the question whether, on August 13, 1986, he ''felt'' that the Respondent had ''repudiated'' the contract. Other testimony, however, by both Alderson and by the Respondent's owner, Jerry Durham, establishes a context indicating that Alderson may have been using the term ''repudiated'' only in the sense of ''ignoring'' or ''failing to comply with'' the agreement. The record does not establish that at any time prior to the beginning of the 10(b) period (Sept. 27, 1986), Durham made statements manifesting a clear and unequivocal repudiation of the agreement he had signed July 29, 1985, as distinguished from statements manifesting an intent not to engage in work that would be subject to the agreement.

Alderson, who was generally credited by the judge,[4] testified that in the summer of 1986 he had encountered Durham on several occasions doing work on a hospital construction project to which the collective-bargaining agreement applied. Alderson stated that he had reminded Durham that he had signed a collective-bargaining agreement, but Durham had contended that the project was a ''non-union job'' because the general contractor and another contractor on the site from whom Durham had obtained the work did not have union contracts. There was then a brief discussion in which Alderson explained that this did not make the agreement that Durham had signed inapplicable to the work. Alderson further testified that Durham subsequently had asked him about the bond requirement and other cost implications of the agreement and had stated that he would ''get off the job'' and possibly ''have to get off of commercial work altogether.'' Durham did not leave the job, and on August 13 the Union picketed Durham and another contractor. Alderson testified that an exception to the agreement's no-strike clause permitted picketing for failure to make trust fund contributions.

In sum, a reasonable person could have interpreted Durham's remarks as an indication that he had found

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Contrary to the judge's findings at fns. 10 and 16, Union Business Agent James Alderson testified that the Union moved its offices from East Sunshine Street to East Meadowmere Street, not from East Meadowmere to East Sunshine. This error does not affect our decision.

[2] We agree, for the reasons stated by the judge, that the Board has jurisdiction over the Respondent under the Board's indirect inflow and outflow standard. We therefore find it unnecessary to pass on the alternative basis relied on by the judge.

[3] The General Counsel cross-excepts to the judge's limiting the remedy to those persons whom the General Counsel proved to be bargaining unit employees. We agree that the judge improperly limited the remedy and shall leave to compliance the identity of the unit employees subject to the remedial order.

We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds to satisfy our ''make-whole'' remedy. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

We shall modify the unit description to conform to the unit alleged in the complaint and established by the evidence.

Finally, we shall modify the judge's recommended Order and issue a new notice to correct inadvertent errors and more closely address the violations found.

[4] On matters as to which the judge made specific credibility resolutions, the judge credited Alderson over Durham, in part on demeanor grounds.

compliance with the collective-bargaining agreement too expensive and that he contemplated avoiding liability under the agreement simply by not having his company do work covered by it in the future.[5] Given the apparent misunderstanding between Durham and Alderson about what constituted ''union jobs,'' even Durham's own claim about a statement he assertedly had made to Alderson in August 1986 supports this view. In a pretrial affidavit taken by Durham's attorney, and reaffirmed by Durham at the hearing, Durham claimed that he told Alderson that it was impossible for him to obtain a bond or worker compensation insurance and that ''therefore I did not intend to hire any union employees or take on any union jobs or be bound by his contract.'' Under all the circumstances, this simply does not rise to the level of an unequivocal total contract repudiation. Compare *A & L Underground*, above, 469 (letter expressly repudiating agreements). We therefore find that the unfair labor practice charge filed on March 25, 1987, was timely.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Jerry Durham Drywall, d/b/a J & S Drywall, Mansfield, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize the International Brotherhood of Painters & Allied Trades, Local 203, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees of Respondent performing work within the trade of the Painters & Allied Trades, including all sandblasters, tapers, spraymen, highmen, pressure rollers, paperhangers on commercial job projects located within [the geographic jurisdiction of the collective-bargaining agreement], excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Failing or refusing to accept, give effect to, and implement the terms and conditions of the collective-bargaining agreement between the Respondent and the Union, for the period September 27, 1986 through March 31, 1987.

(c) Failing or refusing to make payments to the Painters Local 203 Apprenticeship Training Fund and its Health and Welfare Fund, as provided in the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

(d) Failing or refusing to make payments to the Painters Local 203 Pension Fund, as provided in the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

(e) Failing or refusing to withhold and remit to the Union authorized dues from unit employees' paychecks, as provided in the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

(f) Failing or refusing to pay its unit employees the hourly wage scale established for their classifications in the bargaining agreement, for the period September 27, 1986 through March 31, 1987.

(g) Failing or refusing to pay social security taxes for its employees, for the period from September 27, 1986 through March 31, 1987.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the International Brotherhood of Painters & Allied Trades, Local 203, as the exclusive representative of the Respondent's unit employees, with respect to rates of pay, wages, and other terms and conditions of employment, for the period September 27, 1986 through March 31, 1987.

(b) Give retroactive effect to all terms and conditions of the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

(c) Make whole, in the manner described in the remedy section of the judge's decision, all unit employees for any loss of pay and benefits, including payment of social security taxes, which they may have suffered by reason of the Respondent's refusal to abide by and give effect to the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987, with interest.

(d) Make whole the appropriate union trust funds for any failure to make the contributions required by the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

(e) Pay to the Union all authorized dues which should have been deducted and remitted to the Union

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[5] While the agreement does not have clear jurisdictional provisions other than those indicating geographical coverage, art. 26(b) suggests that individuals such as Durham are covered only when they are performing work on commercial or industrial projects.

[6] Member Cracraft agrees that the record does not establish that there was a clear and unequivocal contract repudiation outside the 10(b) period. In so finding, she relies on the Respondent's inquiry made the day after Durham, the Respondent's owner, told the Union that he did not intend to pay union dues, that he was a nonunion contractor and that he would not be working on union jobs. At the union hall the following day, Durham asked Union Business Agent Alderson what the Respondent needed to charge in order to meet the Union's wage and benefit rates and what needed to be done to meet the Union's bond requirements. This inquiry was clearly and unequivocally inconsistent with a desire to repudiate the contract. Under these circumstances, Member Cracraft finds it unnecessary to pass on whether the Respondent's statements prior to its inquiry, standing alone, would suffice to establish a clear and unequivocal express contract repudiation.

Member Devaney agrees that the complaint in this case is not barred by Sec. 10(b). The bargaining agreement was effective by its terms until March 31, 1987. The charge was filed March 23, 1987, during the term of the agreement. Thus, for the reasons stated in his dissenting opinion in *A & L Underground*, above, Member Devaney would find the complaint here not to be time-barred.

under the bargaining agreement, for the period September 27, 1986 through March 31, 1987, with interest.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(g) Post at the Respondent's place of business in Mansfield, Missouri, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to recognize the International Brotherhood of Painters & Allied Trades, Local 203, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All employees of Respondent performing work within the trade of the Painters & Allied Trades, including all sandblasters, tapers, spraymen, highmen, pressure rollers, paperhangers on commercial job projects located within [the geographic jurisdiction of the collective-bargaining agreement], excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to accept, give effect to, and implement the terms and conditions of our collective-bargaining agreement with the Union, for the period September 27, 1986 through March 31, 1987.

WE WILL NOT fail or refuse to make payments to the Painters Local 203 Apprenticeship Training Fund and its Health and Welfare Fund, as provided in the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

WE WILL NOT fail or refuse to make payments to the Painters Local 203 Pension Fund, as provided in the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

WE WILL NOT fail or refuse to withhold and remit to the Union authorized dues from unit employees' paychecks, as provided in the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

WE WILL NOT fail or refuse to pay our unit employees the hourly wage scale, as established for their classifications in the bargaining agreement, for the period September 27, 1986 through March 31, 1987.

WE WILL NOT fail or refuse to pay social security taxes for our employees, for the period September 27, 1986 through March 31, 1987.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the International Brotherhood of Painters & Allied Trades, Local 203, as the exclusive representative of our employees in the appropriate unit, with respect to rates of pay, wages, and other terms and conditions of employment, for the period September 27, 1986 through March 31, 1987.

WE WILL give retroactive effect to all terms and conditions of the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

WE WILL make whole all unit employees for any loss of pay and benefits, including payment of social security taxes, which they may have suffered by reason of our refusal to abide by and give effect to the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987, with interest.

WE WILL make whole the appropriate union trust funds for our failure to make the contributions required by the collective-bargaining agreement, for the period September 27, 1986 through March 31, 1987.

WE WILL pay to the Union all authorized dues which should have been deducted and remitted to the Union under the bargaining agreement, for the period

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

September 27, 1986 through March 31, 1987, with interest.

JERRY DURHAM DRYWALL, D/B/A J & S DRYWALL

Lyn R. Buckley, Esq., for the General Counsel.
Donald W. Jones, Esq., *Steven E. Marsh, Esq.*, of Springfield, Missouri, for the Respondent.
James W. Alderson, of Springfield, Missouri, for the Charging Party.

DECISION

WILLIAM A. POPE II, Administrative Law Judge. In a complaint, dated September 18, 1987, the Acting Regional Director for Region 17 of the National Labor Relations Board alleged that the Respondent, Jerry Durham Drywall, d/b/a J & S Drywall, a (sole) proprietorship owned by Jerry Durham, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing to abide by or continue in full force and effect all of the terms and conditions of a collective-bargaining agreement.[1] The charge in this case was filed by the International Brotherhood of Painters & Allied Trades, Local 203 (the Union or Local 203) on March 25, 1987. Trial took place between December 7,1987, and December 10, 1987, in Springfield, Missouri, before Administrative Law Judge William A. Pope II.

I. BACKGROUND

Operating under the name of J & S Drywall, Mansfield, Missouri,[2] Jerry Durham is engaged in the business of finishing drywall. Durham has operated his business for approximately 5 years. During 1986 and 1987, J & S Drywall, as a subcontractor of Ozark Interiors, performed drywall finishing work on a number of commercial remodeling and construction jobs, most of which were located in the Springfield and Joplin, Missouri areas. Jerry Durham worked on J & S Drywall's jobs, himself, and hired other drywall finishers, as needed, to help him complete the jobs on time. The individuals hired by Durham to work on J & S Drywall's jobs were paid as independent contractors for tax purposes, and each of them received a 1986 Internal Revenue Service form 1099-MISC from J & S Drywall, listing the money they received from J & S Drywall that year for their work as ''Nonemployee compensation.'' The parties stipulated that on or about August 13, 1986, the Union picketed the St. John's Hospital jobsite in Springfield, Missouri, where the Respondent was working, in part because of a labor dispute between the Union and the Respondent. The parties further stipulated that on or about April 16, 1987, the Union picketed the Holiday Inn construction site in Springfield, Missouri, where Respondent was working, in part because of a labor dispute between the Union and the Respondent.

II. ISSUES

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, by engaging in the the following unfair labor practices:

> Since on or about September 27, 1986, the Respondent has failed and refused to abide by or continue in full force and effect all the terms and conditions of a collective-bargaining agreement between the Respondent and the Union, entered into on or about July 29, 1985, and effective by its terms to March 31, 1987.

A. *General Counsel's Theory of the Case*

General Counsel argues that the evidence shows that on July 29, 1985, Jerry Durham, the owner of J & S Drywall, the Respondent, handed James Alderson, the business representative of Local 203, International Brotherhood of Painters and Allied Trades, two signed and dated copies of a collective-bargaining agreement between the Respondent and Local 203. Alderson signed both copies of the agreement on behalf of Local 203, and returned one signed copy to Durham. The term of the agreement was from July 29, 1985, to March 31, 1987. Prior to signing the agreement, Jerry Durham and Brad Dunbar, who did drywall finishing work for J & S Drywall, came to Local 203's office and made down payments on the initiation fees and dues required for membership in Local 203. Citing Section 8(f) of the Act, and *John Deklewa & Sons*, 282 NLRB 1375 (1987), General Counsel asserts that the Respondent is engaged in the construction industry, and that the collective-bargaining agreement is enforceable regardless of whether or not a majority of Respondent's employees had chosen the Union as their collective-bargaining representative.

There is no dispute, states the General Counsel, that the Respondent did not pay anything into Local 203's fringe benefit funds, and failed to pay union dues. Although the Respondent called the drywall finishers who worked on J & S Drywall's jobs independent contractors, and did not deduct income taxes or pay social security for them, in fact his workers were employees, as defined by the Board. The record shows, argues the General Counsel, that Jerry Durham hired workers for each job, set their rate of pay, directed them where to work and when to be there, set priorities on the jobs, and monitored the work in progress and controlled the result. Unlike independent contractors, the workers had no entrepreneurial interest in their working arrangements, did not exercise independent judgment, and took no risks in order to increase profits. Thus, says the General Counsel, the workers were employees of J & S Drywall, and not independent contractors. As employees, the collective-bargaining agreement to which J & S Drywall was a party was applicable to them.

The General Counsel asserts that the evidence of records shows that the Respondent engaged in interstate commerce and that the Board has jurisdiction in this case. During the period from June 1, 1986, to June 1, 1987, the Respondent performed over $50,000 worth of work for Ozark Interiors, which was engaged in interstate commerce. Further, on several of its jobs, the Respondent became involved in labor dis-

[1] On October 20, 1987, the Board denied Respondent's Motion for Summary Judgment, dated October 13, 1987.

[2] It appears from testimony during the hearing that J & S Drywall was somewhat interchangeably referred to as Jerry Durham Drywall.

putes which could or did have a significant impact on other employers who were engaged in interstate commerce. General Counsel cites *Shore v. Building Trades Council*, 173 F.2d 678 (3d Cir. 1949), for the proposition that Congress has the power to regulate labor practices in industries, such as the construction industry, which are themselves dependent upon interstate commerce.

General Counsel denies that this proceeding is barred by Section 10(b) of the Act. The Respondent's conduct in 1986 did not put the Union on notice that the Respondent intended to continue to perform unit work without applying the terms of the collective-bargaining agreement. General Counsel says that it is well settled that the 10(b) period does not begin to run until the aggrieved party has clear and unequivocal notice of conduct constituting an unfair labor practice. The Respondent's refusal to abide by the terms of the collective-bargaining agreement in the summer of 1986 did not put Local 203 on notice that the Respondent had repudiated the agreement, because the Respondent stated that it would not in the future perform commercial jobs. Furthermore, asserts the General Counsel, each refusal of the Respondent to abide by the terms of the agreement constituted a separate violation of the Act.

The appropriate remedy in this case, asserts the General Counsel, is an order that the Respondent not repudiate the collective-bargaining agreement and withdraw recognition from the Union during the term of a valid collective-bargaining agreement, that the Respondent make unit employees whole for any loss of wages or benefits that they suffered because of Respondent's failure to abide by the collective-bargaining agreement from September 27, 1986, to March 31, 1987, and that Respondent make whole unit employees by making contributions into the Union's Health and Welfare Fund, Pension Fund, and Apprenticeship Training Fund, as required by the collective-bargaining agreement, and that an appropriate notice be posted.

B. *Respondent's Theory of the Case*

Respondent asserts that the charge and complaint in this case are barred by operation of Section 10(b) of the Act. According to the Respondent, even if he entered into a valid collective-bargaining agreement on July 29, 1985, he never implemented the agreement, and any charge or complaint based on the agreement is barred by the 6-month statute of limitations (Sec. 10(b)), because the charge was not filed until March 25, 1987. Respondent argues that it is well settled that where the initial refusal to comply with the terms of a collective-bargaining agreement occurred more than 6 months prior to the filing of a charge, the charge is too late. Here, says the Respondent, the Union knew in July 1986 that the Respondent was not keeping up his end of the collective-bargaining agreement. Furthermore, contends the Respondent, the ''continuing'' violation theory is inapplicable in this case, because there is no evidence of a demand and refusal to bargain within the 10(b) period (between Sept. 25, 1986, and Mar. 25, 1987).

In any event, argues the Respondent, there was never a valid agreement between the Respondent and Local 203, because there was never a ''meeting of the minds.'' Jerry Durham acknowledges that there were discussions between him and James Alderson about the Respondent entering into a collective-bargaining agreement, but asserts that he withdrew his offer to become a union contractor because he was unable to obtain insurance and a bond, which were conditions precedent to becoming a union contractor.

In addition to the fact that there was never a ''meeting of the minds,'' says the Respondent, there is no valid contract, because the Union never communicated to him its acceptance of his offer to become a union contractor. Consistent with this theory, the Union never acted as though it believed it had a contract. For instance, no grievances were ever filed under the contract, and the Union engaged in organizational picketing against the Respondent, something which would have been unnecessary if the Union believed it already had a collective-bargaining agreement with the Respondent. Further, Business Agent Alderson never reported to the trustees of the fringe benefits funds that Respondent had failed to make payments to the funds.

Moreover, argues the Respondent, even if he had entered into a collective-bargaining agreement with Local 203, as alleged, the contract would be illegal and void, because he assisted one of his employees, Brad Dunbar, in joining the Union as a member. In this regard, says the Respondent, Business Agent Alderson told him he could take his employee, Brad Dunbar, to the Union's office, and sign him up as a member of the Union. The evidence shows that Durham and Dunbar became members of Local 203 on July 29, 1985, the same day Durham allegedly signed a collective-bargaining agreement with Local 203. Under these circumstances, the agreement is void because of unlawful assistance by an employer to a union.

Respondent further argues that while Section 8(f) authorizes prehire agreements in the construction industry, it does not permit a construction contractor and a union of construction employees to enter into a collective-bargaining agreement where, as here, the majority of the existing employees of the employer are not represented by the union.

The Respondent argues that retroactive application of the new principles announced by the Board in *John Deklewa & Sons*, 282 NLRB 1375 (1987), violates his rights to due process and freedom of choice guaranteed under Section 7 of the Act. Durham points out that at the time he repudiated the collective-bargaining agreement in 1986, such repudiation was lawful under Board and court law, even assuming that an 8(f) agreement then existed. The Respondent concludes that constitutional principles indicate that a vested defense should not be retroactively taken away, and new liabilities should not be retroactively created.

The Respondent further asserts that the Board does not have jurisdiction in this case, because there is no evidence of any interstate transactions by Jerry Durham, or that Jerry Durham's business had any affect on interstate commerce. Durham's business is a sole proprietorship, which is local in nature. Respondent denies that there is any evidence that his business did $50,000 or more annually in business with any person or company, and under such circumstances, jurisdiction should not be asserted by the Board. The indirect inflow and outflow standards do not apply to J & S Drywall, asserts the Respondent, because it did not do $50,000 worth of business in a calendar year with a person or business engaged in interstate commerce.

Finally, the Respondent asserts that it did not have any employees during the period from September 27, 1986, through March 31, 1987, and, therefore, it had no duties

under the alleged collective-bargaining agreement. The Respondent contends that all of the persons who worked for it during that period were independent contractors, rather than employees. Respondent asserts that the evidence shows that 80 percent of drywall workers simply walk on the jobsite, looking for work. He asks them if they have their own tools, and tells them the rate of pay per square foot. Some of the drywall workers hire their own helpers. Durham asserts that he only uses experienced subcontractors so that he will not have to supervise them or control the manner and means by which they perform their work. According to Durham, he shows the workers where to start working, but does not stay to supervise or direct them.

III. FINDINGS AND CONCLUSIONS

a. *Jurisdiction*

Section 10(a) of the Act empowers the Board ''to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce.'' As defined in Section 2(7), ''the term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.'' As defined in Section 2(6), ''the term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States . . . .''

As stated by the Supreme Court in *NLRB v. Fainblatt*, 306 U.S. 601, 604–605 (1939), ''an employer may be subject to the National Labor Relations Act although not himself engaged in [interstate] commerce.'' ''The power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate.''

In general, the Board's jurisdiction extends to ''labor disputes'' ''affecting'' interstate commerce.[3] Congress has the power to regulate interstate commerce, regardless of the volume. *NLRB v. Fainblatt*, supra, 306 U.S. at 606. Congress did not set any limitation on the Board's jurisdiction based on the volume of interstate commerce involved, other than the inference that it be more than that to which the courts would apply the maxim de minimis. *NLRB v. Fainblatt*, supra, 306 U.S. at 606–607. The Board, however, has set standards concerning the minimum annual dollar volume of certain categories of businesses which must be exceeded before it will assert jurisdiction. For nonretail enterprises, such as the Respondent's business, the gross outflow or inflow across state lines must be at least $50,000, regardless of whether such outflow or inflow is regarded as direct or indirect. *Siemons Mailing Service*, 122 NLRB 81, 83–84 (1958), supp., 124 NLRB 594 (1959).''[4]

It is well established that ''what affects the building industry in a given community affects interstate commerce.'' *Shore v. Building & Construction Trades Council*, 173 F.2d 678, 681 (3d Cir. 1949) (in which it was held that while one small work stoppage in the building industry may have no immediately perceptible effect on interstate commerce, many such stoppages will have such effect, and, therefore, Congress may, through its power to regulate what affects interstate commerce, regulate labor practices in industries which are themselves dependent on interstate commerce.

The jurisdictional issues in this case are, what jurisdictional standard must the Respondent meet before the Board will assert jurisdiction, and does the evidence show that his business met that standard. The Respondent is not engaged in retail trade and does not sell a product. The Respondent sells a service to the construction industry, specifically drywall finishing. Clearly, therefore, the jurisdictional standard which the Respondent must meet before the Board will assert jurisdiction is the standard applicable to nonretail enterprises, as stated above.

The Board has said that ''its jurisdictional criteria expressed in terms of annual dollar volume of business do not literally require evidentiary data respecting any certain 12-month period of operation.'' *Reliable Roofing Co.*, 246 NLRB 716 fn. 1 (1979), citing *Mine Workers District 2 (Mercury Mining)*, 96 NLRB 1389, 1390–1391 (1951). In *Reliable Roofing Co.*, supra, the Board found jurisdiction based on the employer's most recent complete fiscal year preceding the unfair labor practices. The Board has also approved the use of the last full calendar year preceding the year in which the alleged unfair labor practices occurred, and the most recent calendar year preceding the year of the hearing and decision. *Reliable Roofing Co.*, supra, 246 NLRB at 716 fn. 1, citing *Acme Equipment Co.*, 102 NLRB 153, 161 (1953), and *Aroostook Federation of Farmers*, 114 NLRB 538 (1955). In the same case, the Board cited with approval the administrative law judge's decision in *Blake's Restaurant*, 230 NLRB 27, 28 (1977), in which the administrative law judge stated that the Board could rely on the experience of an employer during the most recent calendar or fiscal year, or the 12-month period immediately preceding the hearing. In *Idaho State District Court*, 164 NLRB 95, 96 (1967), also cited by the Board in *Reliable Roofing Co.*, supra, the Board said it would have asserted jurisdiction even though the employer's gross volume fell below the required amount in '''the year the dispute arose' involving picketing and decreased sales.''

The General Counsel contends that Respondent met the $50,000 jurisdictional test, because he performed over $50,000 worth of work for Ozark Interiors, which is engaged in interstate commerce, during the period from June 1, 1986, to June 1, 1987. The General Counsel further asserts that the Respondent was involved in a labor dispute which affected commerce, on two occasions when the Union picketed jobsites where the Respondent was working. The Respondent acknowledges that the Respondent did $23,849.92 worth of business with Ozark Interiors in 1986, and $41,480.41 worth

[3] Sec. 2(9) of the Act defines the term ''labor dispute'' as ''any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.''

[4] ''For the purposes of applying this standard, direct outflow refers to goods shipped or services furnished by the employer outside the State. Indirect outflow refers to sales of goods or services to users meeting any of the Board's jurisdictional standards except the indirect outflow or indirect inflow standard. Direct inflow refers to goods or services furnished directly to the employer from outside the State in which the employer is located. Indirect inflow refers to the purchase of goods or services which originated outside the employer's State but which he purchased from a seller within the State who received such goods or services from outside the State. In applying this standard, the Board will adhere to its past practice of adding direct and indirect outflow, or direct and indirect inflow. It will not add outflow and inflow.'' *Siemons Mailing Service*, supra, 122 NLRB at 85.

of business in 1987, but disputes that the Respondent did $50,000 worth of business in any one year, or that he was involved in interstate commerce.

I find that the Board has jurisdiction in this case, for either one of two reasons. First, the Respondent, while not itself engaged in interstate commerce, is involved in the construction industry, which is dependent on interstate commerce and is subject to regulation under the Act, and furnished services valued in excess of $50,000 to Ozark Interiors, a firm whose operations satisfy the Board's jurisdictional standards. Second, the Respondent was involved in a labor dispute which affected interstate commerce through picketing by the Charging Party Union which shut down two major constructions projects which were involved in interstate commerce. Each of the projects was shut down by picketing for 1 day.

Contrary to Respondent's assertion, the Board's exercise of jurisdiction is not dependent on an employer's volume of business during any one calendar year. It is well within the scope of the Board's decisions to base jurisdiction on a 12-month period which includes the date on which the charge was filed. In this case there is financial evidence in the record of this proceeding covering the period from June 1, 1986, through May 31, 1987, a 12-month period which includes the filing of the charge in this case on March 25, 1987, showing that Respondent furnished services valued in excess of $50,000 in a 12-month period of time to Ozark Interiors, a higher level construction industry subcontractor who was engaged in interstate commerce.[5] Respondent's billings to Ozark Interiors between June 2 and December 31, 1986, for drywall finishing work performed by the Respondent for Ozark Interiors on various construction or remodeling projects, amounted to approximately $23,157. During 1987, the Respondent did drywall finishing work for Ozark Interiors, amounting to $41,480.41, of which at least $35,000 was for Respondent's work on the Holiday Inn construction project, which Respondent completed in May 1987. Thus, during the 12-month period, Respondent met the Board's jurisdictional standard by furnishing services valued in excess of $50,000 to a construction industry subcontractor whose operations in interstate commerce met the Board's standards.

The labor dispute between the Respondent and the Charging Party led to two work stoppages on construction projects for which DeWitt and Associates was the general contractor and Ozark Interiors was a subcontractor. The Respondent, in turn, was a subcontractor of Ozark Interiors on these projects. The first project was extensive remodeling and construction at St. John's Hospital, Springfield, Missouri, which took place over the period from January 1986 through December 1987. The total value of DeWitt and Associates' jobs at St. John's Hospital was approximately $8,178,489. The Respondent was a subcontractor of Ozark Interiors on the Lithotripter job (part of the St. John's Hospital job) in August 1986. The total cost of that job was $103,864. The second project was the construction of a new Holiday Inn in Springfield, Missouri, which took place between February 1986 and June 1987. DeWitt and Associates was the general contractor on that job, which was valued at $4,025,000. Respondent was working on the job as a subcontractor of Ozark Interiors in April 1987. Both projects involved extensive use of supplies moving in interstate commerce, and services performed by contractors from outside the State of Missouri.

On or about August 13, 1986, the Charging Party Union picketed the St. John's job because of its labor dispute with the Respondent. During the 1 day that picketing took place, all work stopped on the three projects then in progress: The Hamons Heart Institute (a $4,274,833 project), the Cardio Cath Lab (a $362,407 project), and the Lithotripter job (a $103,864 project) on which the Respondent was working as a subcontractor of Ozark Interiors. Among the crafts which refused to cross the picket line were pipe fitters, electricians, carpenters, sheet metal workers, metal stud installers, tapers, painters, elevator installers, pool installers, and laborers.

On or about April 16, 1987, the Charging Party Union picketed the Holiday Inn construction project because of its labor dispute with Ozark Interiors (and its alter ego, Union Interiors), and the Respondent. Again, all of the crafts working on the project refused to cross the picket line, and all work on the project was halted for the 1 day that picketing by the Charging Party Union took place. At the time, there were 73 people at work on the job, including carpenters, laborers, operating engineers, bricklayers, electricians, pipe fitters, sheet metal workers, roofing workers, technicians, floor covering workers, and painters. The Respondent, who was a subcontractor of Ozark Interiors, had drywall finishers at work on the project.

The impact of the work stoppages was to delay construction work on the projects, not only by the Respondent, but by all of the contractors, subcontractors, and workmen working on the job at the time. The work stoppage had the further chain reaction effect of getting back the work schedule for completion of other work required to complete the project. While there is no way to ascertain the total monetary cost of the work stoppages, it is beyond dispute that the work stoppages had some affect on interstate commerce. As previously noted, the relative size of the impact on the flow of interstate commerce resulting from a work stoppage in the construction industry is not a factor in establishing the Board's jurisdiction. The Board has jurisdiction over labor disputes which affect interstate commerce, and with regard to the construction industry, which is heavily dependent on interstate commerce, it has been held that even small labor disputes affect interstate commerce. The Board's jurisdiction in this case, therefore, is clearly established.

b. *Collective-bargaining agreement*

From the evidence of record, I find that on or about July 29, 1985, the Respondent entered into a binding collective-bargaining agreement with Local 203, which agreement, by its terms, did not expire until March 31, 1987.

Jerry Durham, d/b/a J & S Drywall, is engaged in the building and construction industry. International Brotherhood of Painters & Allied Trades, Local 203, the Charging Party, is a labor organization whose members are employed in the

[5] In 1986, Ozark Interiors, a nonretail construction enterprise doing business in Missouri, had an annual direct inflow of goods across state lines of at least $50,000, and, therefore its operations satisfy the Board's jurisdictional standards. In 1986, Ozark Interiors purchased $97,238 worth of construction supplies, tools, and equipment from suppliers outside the State of Missouri. Ozark Interiors did not perform any work outside the State of Missouri in 1986; however, in 1986 it did approximately $2,924,347 in business within the State of Missouri for public utilities, transit systems, newspapers, health care institutions, broadcast stations, commercial buildings, education institutions, and retail concerns. Its volume of business in 1987, through the date of hearing, December 7, 1987, was $2,493,101 and included construction and remodeling jobs in Missouri, Arkansas, and Kansas.

building and construction industry. Section 8(f) of the Act permits an employer engaged primarily in the building and construction industry to enter into a prehire agreement ''covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members.'' There are, however, two statutory qualifications applicable to prehire agreements under Section 8(f). First, Section 8(f) does not validate prehire agreements where the union has been established, maintained, or assisted by any action of the employer which violates Section 8(a)(2) of the Act. Second, a prehire agreement under Section 8(f) does not bar an election petition subsequently filed to determine the majority representative .

In the recent case of *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), the Board announced it was abandoning its existing interpretations of Section 8(f), and announced four new basic principles for the interpretation and application of Section 8(f). As stated by the Board in *Deklewa*, supra at 1385:

> When parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements. During its term, an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e). In determining the appropriate unit for election purposes the Board will no longer distinguish between ''permanent and stable'' and ''project by project'' work forces, and single employer units will normally be appropriate.

In *Deklewa*, supra at 1387, the Board further held that ''[b]eyond the operative term of the contract, the signatory union acquires no other rights and privileges of a 9(a) exclusive representative.'' Thus, after the expiration of an 8(f) contract, a ''union enjoys no continuing presumption of majority status, and the Respondent is not compelled to negotiate or adopt a successor agreement based solely on the existence of an 8(f) relationship.'' Id. at 1389.

Concerning retroactive application of the new principles, the Board stated in *Deklewa* that ''we will apply the Board's new 8(f) principles to this case and to all pending cases in whatever stage.'' Ibid. The Board's retroactive application of *Deklewa* was upheld by the Third Circuit in *Iron Workers v. NLRB*, supra. The Board, in a subsequent case, applied *Deklewa* retroactively in deciding to defer to arbitration awards which involve prehire contracts. *MIS Inc.*, 289 NLRB 491 (1988). But, a Federal district court refused to apply *Deklewa* retroactively in a case involving an employer's refusal to pay pension fund contributions after repudiating a prehire contract. *National Sprinkler Industry v. American Automatic Fire Protection*, 680 Supp. 731 (D.Md. 1988). In accordance with the Board's view, as upheld by the Third Circuit Court of Appeals, I find that the *Deklewa* principles are controlling in the instant case.

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer ''to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .'' The difference between unlawful domination and interference is a matter of degree, with unlawful interference being the lesser offense. The Board has said that there is no impropriety where there is no evidence ''demonstrating the absence of an arm's length relationship between employer and union.'' *Coppinger Machinery Service*, 279 NLRB 609, 611 (1986). In that case, the Board found no violation of Section 8(a)(2), by unlawful support of a union by an employer, resulting from ''cooperation of a ministerial character growing out of an amicable labor-management relationship.'' *Coppinger Machinery Service*, supra, 279 NLRB at 611.

According to James Alderson, the business agent for Local 203, Jerry Durham asked him on July 29, 1985, what was involved in becoming a union contractor. Durham explained that he had a job in Kansas City, for which he had to be a union contractor and a union member. Alderson testified that he told Durham that the latter would have to sign and abide by a contract, and employ one journeyman before he could work on the job himself. Alderson stated that his conversation with Durham on that day took place at the Ramada Hawthorn Hotel in Springfield, Missouri, where Alderson was working on a job.

The next day, testified Alderson, while he was working on the same job, Durham handed him two copies of the joint working agreement, which Durham had already signed and dated.[6] According to Alderson, he signed both copies of the agreement, returned one to Durham, and kept the other. During the conversation, Durham asked Alderson if he would have any problem working in the Kansas City area if he showed the business agent of the local union having jurisdiction over that area that he was a brand new member of Local 203, or had applied for membership. Alderson testified that he told Durham that Local 203 would issue separate receipts to Durham and Brad Dunbar for initiation payments and dues payments, and that all Durham would have to show to the business agent of the local union in Kansas City was the dues receipt.[7] Alderson stated that he did not talk to Brad Dunbar about becoming a union member, nor was it his understanding that Jerry Durham was going to pay Dunbar's dues, but, he acknowledged that he told Durham that the latter could take Brad Dunbar to the Union's office and have him sign up as a member of the Union.

Local 203's records show that Brad Dunbar joined Local 203 on July 29, 1985, and, made additional payments towards his initiation fee in August and September 1985; and, that Jerry Durham first joined Local 203 on September 14, 1983, and subsequently made irregular payments of various

[6] In an affidavit taken by a Board agent on April 2, 1987, Alderson stated that later that day or the next day, Dunbar, accompanied by Brad Dunbar, came to the Union's office, and while there signed the contract. Alderson said in his affidavit that he was not present when Durham signed the contract. Alderson was not examined during the hearing on the discrepancy between his statements in his affidavit concerning the signing of the contract and his testimony during the hearing concerning the same issue.

[7] According to Alderson, the Union's constitution does not permit new members of the Union to work outside of their local's jurisdiction for 6 months after joining. But, Alderson said, he told Durham that if he showed his dues receipt to the Kansas City business agent, in all probability the business agent would not ask Durham how long he had belonged to the Union.

fees to Local 203, the last such payment having taken place on July 29, 1985.[8] Linda Alderson (James W. Alderson's wife), who is employed as a secretary by Local 203, testified that Jerry Durham and Brad Dunbar came to the Union's office on July 29, 1985, signed up as members of the Union, and made payments on their initiation fees. At that time, Durham asked for a copy of the contract, and she gave him two copies. A few days later, Durham came into the Union's office again, and asked her questions about the contract. He did not leave a signed copy of the contract. Linda Alderson testified that her husband, James W. Alderson, brought in a copy of the contract with Durham's signature on it.

Linda Alderson testified that Brad Dunbar probably came to the Union's office on two other occasions, and that he made more payments on his initiation fee than Durham made on his.[9]

According to Linda Alderson, Durham later came into the Union's office, and stated that he could not obtain the bond required by the collective-bargaining agreement to secure his payments to the Union's fringe benefits funds. She testified that she told him to check with Ollis & Company about obtaining a bond. Linda Alderson said that conversation took place after Local 203 had moved its office from Sunshine (Street) to Meadowmere (Street).[10]

James Alderson stated that he was never present in the Union's office when Jerry Durham came there accompanied by Brad Dunbar.[11] Alderson testified that on later occasions, not all of which were in 1985, he met with Durham, alone, in the Union's office, and they talked about the contract (Joint Working Agreement). Alderson said that Durham never said he could not get a bond, but that he did ask what would happen if he could not get one.

Admitted into evidence is a document entitled ''Joint Working Agreement,'' which Alderson identified as the agreement which he and Durham signed. The document bears the handwritten signature of ''Jerry C. Durham,'' in black ink, under the printed word ''EMPLOYER,'' and the partially handwritten date of signing, also in black ink, as follows, with the handwritten part underlined: ''SIGNED this 29 day of July 1985.'' The number ''5'' is handwritten over the printed number ''4'' in the printed year ''1984.'' Under the printed words ''PAINTERS LOCAL 203'' appears the handwritten signature, in blue ink, of ''J. W. Alderson.'' The signature of ''Jerry C. Durham'' and the handwritten month of ''July'' in the date appear to be in the same person's handwriting, using the same pen. The handwritten number ''29,'' appearing in the blank space preceding the printed word ''day,'' and the handwritten number ''5,'' superimposed over the the printed number ''4'' in the printed year ''1984,'' seem to have been handwritten with the same pen used in writing the signature of ''Jerry C. Durham'' and the word ''July.''

The joint working agreement provides for a union dues-checkoff system, and requires the employer to carry workmen's compensation, public liability, and property damage insurance. The employer is also required to maintain a bond ''to cover all deductions and contributions due the Union and any trust funds.'' The agreement requires the employer to make payments to the Union's apprenticeship training fund, and health and welfare fund.

Jerry Durham, admitted that he did not pay anything into the Union's fringe benefit funds or its apprentice training fund during the period from September 27, 1986, through March 29, 1987.[12]

Alderson testified that the next time he saw Durham was in June or early July 1986, on the St. John's Regional Health Center job. On that occasion, Alderson told Durham that he and Brad Dunbar were behind in paying their union dues, and he asked Durham when he thought they would catch up. Durham replied that he would not be paying any more dues, that he was a nonunion contractor, and that he was not working on union jobs. Durham disputed that the St. John's job was a union job. Alderson testified that he told Durham that the contract (Joint Working Agreement) which he had signed covered all jobs, and made no distinction between union and nonunion jobs. Durham asked if he had signed a contract with the Union. Alderson testified that he told Durham that he had a copy (of a Joint Working Agreement) with Durham's signature on it. Durham replied that if his signature was on it, he must have signed it. Durham stated that he could not afford to be in the Union, or pay union scale wages and benefits, and said that he was going to finish up that job and get out of commercial work.

The following day, according to Alderson, he had conversation with Durham at the Union's office. Durham inquired how much he would have to charge per square foot for finishing sheet rock in order to pay union scale wages and benefits. Alderson testified that he told Durham that the Union's accountant could help Durham figure that out, and he told Durham that the Union needed to know that Durham had Missouri workmen's compensation insurance (and that most people would require that he have public liability insurance before he could work on jobs). In response to Durham's question concerning what would happen if he could not obtain a $5000 bond to cover payments to the Union's benefits funds, Alderson said he told Durham that the Union had waived that requirement for some small employers, with only one or two employees, while some employers had put up a cash deposit and other employers had purchased certificates of deposit in the name of their company and the Union's trustees.

According to Alderson, the Union picketed the St. John's job for one day on approximately August 13, 1986. The picket sign in front of the Hammons Heart Institute read ''Painter Local 203 on Strike against Union Interior, Incorporated.'' The sign in front of the St. John's Regional Health Center read the same, except that the strike was against Jerry

[8] Local 203's membership ledger shows that Brad Dunbar made payments for dues, and/or initiation or other fees on July 29, 1985; August 8, 1985; and, September 24, 1985. The ledger sheet for Jerry Durham shows that he made payments to Local 203 for dues, and/or initiation or other fees on February 14, 1983; June 20, 1983; during October 1983 (day of the month is obliterated on the copy of the ledger in evidence); on April 4, 1984; and, on July 29, 1985. Jerry Durham testified that he first joined Local 203 in 1983.

[9] Jerry Durham and Brad Dunbar were dropped as members of Local 203 on March 31, 1986, because they were 6 months behind in paying their dues.

[10] James W. Alderson testified that Local 203 moved its office from 1918 East Meadowmere to 2200 East Sunshine in November or December 1985.

[11] Jerry Durham described Brad Dunbar as one of his most regular workers.

[12] Linda Alderson, the Union's secretary, testified that Jerry Durham did not make any payments to the Union's benefit funds. She said that she just supposed that he did not have any jobs. Linda Alderson said that employers usually request fringe benefit report forms, and that she did not necessarily send them to employers automatically.

Durham Drywall or, according to Alderson, possibly J & S Drywall. The reason for the picketing was the failure of the Respondent to make payments to the Union's fringe benefits funds. Alderson acknowledged, however, that he did not send a letter to Jerry Durham informing him of the purpose of the picketing or the requirement that he make payments. That requirement, said Alderson, was contained in the contract, which Durham had signed.

Alderson testified that he next saw Durham on August 20, 1986, working on the St. John's job. On that particular day, Durham and Brad Dunbar were working side by side taping and finishing a wall. In response to Alderson's question to Durham concerning his intentions, Durham said that he had been told by the job superintendent to get off the job and guessed he would have to get off commercial work altogether.[13] Alderson testified that he called Ted Smith, the president of DeWitt and Associates, who said he would get Durham off the job, and followed through on that promise. Alderson stated that Durham should have made payments to the Union's benefit funds for the work he performed on the St. John's project in July and August 1986, but, Alderson, admitted, he never talked with Durham about money owed to the Union for anything other than dues.

In March 1987, Alderson testified, he saw Jerry Durham, Brad and Frank Dunbar, James McGill, and two others Alderson did not know, doing drywall finishing work on the new Holiday Inn project. Earlier in March 1987, Alderson had observed two drywall finishers he did not know working on the Holiday Inn job. They told him that Jerry Durham had sent them.

On March 23, 1987, Melvin Painting Company employees walked off the Holiday Inn project, because there were nonunion tapers working on the job. Alderson said that he did not see Jerry Durham or his pickup truck on the job on March 23, 1987, but he thought that as of that date Durham had repudiated the collective-bargaining agreement, and Alderson filed the charge in this case on that day. On April 16, 1987, the Union picketed the Holiday Inn jobsite because nonunion drywall finishers were working on the job.

Alderson stated that he did not send Durham any correspondence informing the latter that he was required to make payments to the Union's benefit funds, nor did he inform Durham that the Union was relying on the contract when it picketed the jobsites where Durham was working. While there is a no strike clause in the contract, Alderson said, the contract also provides that the Union can take whatever steps are necessary when an employer fails to make contributions to the Union's benefit funds within 10 days after the date required by the Union. Alderson acknowledged that the Union did not make use of the contract's grievance procedures concerning its dispute with the Respondent.

Jerry Durham testified that he rejoined the Union on July 29, 1985, in order to do some work in the Kansas City, Missouri, area.[14] According to Durham, he and Brad Dunbar went to the Union's office on Sunshine Street, where they both signed up as members, made payments (towards dues and initiation fees), and received receipts and work cards. Durham stated that he did not recall seeing Alderson on that occasion. He denied that he signed the Joint Working Agreement at that time.

Durham acknowledged that he performed drywall finishing work on the St. John's hospital project in July, August, and possibly September 1986.[15] He said that he began working on the new Holiday Inn job in March 1987, and that at times he had as many as 10 to 12 workers on the job. Durham said he worked on both the St. John's job and the new Holiday Inn job as a subcontractor of Ozark Interiors.

Durham testified that he had hoped to get additional work finishing 50,000 square feet of sheetrock on the St. John's job. However, after the picketing by the Union, he was told by Ozark Interiors that he would have to leave the job because there was a union problem.

By an invoice bearing the date of July 14, 1986, Jerry Durham billed Ozark Interiors $521.14 for the work he had done on the Lithotripter part of the St. John's Hospital project. He testified that he had performed the work during the second week of July 1986, and that Brad Dunbar had worked with him part of the time. Durham said that while working on that job, he had a conversation with James Alderson, during which Alderson told him that the job was a union job. The next day, Durham said, the Union picketed the job. Durham said that he completed the part of the project he was working on, but he was unable to get the job of doing an additional 50,000 square feet of drywall finishing work on the project, because Ozark Interiors told him that there was union trouble and he had to leave.

Durham testified that a day or two after seeing Alderson on the St. John's job, he went to the Union's office on Meadowmere Street,[16] because he wanted to ask to Alderson what he would have to do to become a union contractor, so that he could get the job of finishing the additional 50,000 square feet of drywall on the St. John's job from Ozark Interiors. He spoke to Alderson in a large room, in which the Union's secretary was also present, but not within hearing distance. According to Durham, Alderson told him he would have to sign a contract and comply with its terms. Durham stated that Alderson was unable to say how much Durham would have to raise his bids to cover his additional costs, nor did Alderson know how much the insurance and bond required by the contract would cost. From Alderson, Durham testified, he received a copy of the contract, but he did not sign it at that time. Durham said he did not believe that Alderson had signed it as of then, either. In fact, Durham

[13] Alderson testified that he had two conversations with Ted Smith, of DeWitt and Associates, about Jerry Durham, the first of which was on August 14, 1986, the day after the picketing. In his earlier statement to a Board agent, Alderson said that after picketing the St. John's job, he received a telephone call from Ted Smith, President of DeWitt and Associates, who said that he would get Durham off the job. After seeing Durham on the job again about a week later, Alderson said, he called Ted Smith, who said he said he would get Durham off the job and did.

[14] Durham had previously belonged to Local 203 from 1983 until December 1984.

[15] The Respondent billed Ozark Interiors in the amount of $521.14 on July 14, 1986, for work on the Lithotripter job at St. John's. The work had taken about a week, and was performed during the second week of July.

[16] As previously noted, according to the undisputed testimony of James Alderson, in November or December 1985, the Union moved its office from 1918 East Meadowmere Street, Springfield, Missouri, to 2200 East Sunshine Street. Thus, in July 1986, the time when Jerry Durham stated he went to the Union's office on Meadowmere Street to obtain information about becoming a union contractor, the Union's office was actually located on East Sunshine Street.

said, he never saw or received a copy of the contract with both signatures on it.

Durham testified that he subsequently signed the contract, but denied that he met again with Alderson before doing so. According to Durham, a day or two after he talked to Alderson in the Union's office, he went back to the office, and in Alderson's absence, signed one copy of the contract, which he gave to Alderson's secretary, and requested that she give it to Alderson. Durham admitted that he signed General Counsel's Exhibit 10, but denied that Alderson had already signed it for the Union, or that Alderson ever signed in his presence. He said that he did not subsequently receive a copy of the s contract bearing Alderson's signature, nor did anyone inform him that Alderson had accepted the contract.

Durham denied that after signing the contract (G.C. Exh. 10), he required anyone who worked on his jobs to join the Union, pay dues or initiation fees to the Union, or be referred through the union hiring hall.

Both Durham and his wife, Sandra, testified that Durham was unable to obtain the necessary insurance and bond. After trying without success to obtain the insurance and bond, Durham said, he met again with Alderson in the Union's office, at which time he told Alderson that he had not been able to obtain the insurance and bond. According to Durham, he told Alderson that he did not intend to hire any union employees or take union jobs, and that he did not intend to be bound by the contract. Altogether, according to Durham, he went to the Union's office three times, but he saw Alderson only during the first and third occasions.

Durham testified that he had never started performing as a union contractor, and never treated the contract as binding on him. He stated that he was unaware that Alderson was going to claim there was a binding contract until he had a conversation with Alderson on the Holiday Inn job a day or two before March 25, 1987.

Durham fixed the date on which he signed General Counsel's Exhibit 10 (the Joint Working Agreement) as a few days before July 17, 1986, the date of a notice he received from an insurance agency stating that his application for a labor bond had not been approved by the home office.[17]

On balance, after considering the Respondent's demeanor as a witness and the improbability of much of his testimony on key points, I do not credit the Respondent's testimony concerning when he signed the collective-bargaining agreement with the Union.

A comparison of the handwritten signature of Jerry C. Durham on the collective-bargaining agreement, which Respondent admits is his, with the handwritten portions of the date of July 29, 1985, the date of signing, as shown on the original collective-bargaining agreement, discloses even to a layman's eye, that the handwritten portions of the date were written by the same person, with the same pen, as was the signature of Jerry C. Durham. From this, I conclude that Jerry C. Durham signed the collective-bargaining agreement with the Union, and fixed the date of signing as July 29, 1985.

Jerry Durham's claim that he signed the collective-bargaining agreement, leaving the day and month of signing blank (1984 was already printed on the unsigned contract form as the year signed), is incredible on its face. Further, his claim that he signed the agreement a few days before July 17, 1986, the date of a notice which he received from an insurance agency denying his application for a labor bond required by the agreement, is at odds with the chronology of events which he claimed led up to his signing the agreement in the first place.

According to Durham, he billed Ozark Interiors on July 14, 1986, a couple of days after he completed the work, for his work on the Lithotripter area of the St. John's Hospital project. It was while working on that job during the second week of July 1986, he said, that the Union picketed the job site, an action which he said precluded him from receiving an order to do an additional 50,000 square feet of drywall finishing in the Lithotripter area. It was to get this additional work, according to Durham, that he decided to become a union contractor. But it is clear from the testimony of Ted Smith, the representative of DeWitt and Associates, the general contractor on the St. John's Hospital job, that the picketing by the Union to which Durham referred did not occur until on or about August 13, 1986, a month later, more or less. That date corresponds to the date which James Alderson, the Union's business agent, gave as the date his Union picketed the St. John's Hospital job. From this, I conclude that Jerry Durham did not sign the collective-bargaining agreement during the timeframe which he claimed.

I credit the testimony of Linda Alderson, the Union's secretary, that, contrary to Jerry Durham's testimony, he did not give her a copy of the collective-bargaining agreement bearing his signature. I find Linda Alderson to be a credible witness, who testified candidly and forthrightly that she received the signed collective-bargaining agreement from her husband, James Alderson.

While there is a discrepancy between James Alderson's prehearing statement and his testimony during the hearing as to how the copy of the collective-bargaining agreement bearing the Respondent's signature came into the Union's possession, I conclude that his testimony concerning the time when the agreement was signed is plausible and believable. Accordingly, based on these factors, as well as his forthright and candid demeanor while on the stand as a witness, I accept Alderson's testimony that he received two signed copies of the agreement from the Respondent on or about the date of signing shown on the agreement, July 25, 1985, and that he signed both copies for the Union, and returned one of them to the Respondent. Alderson was not asked to explain the discrepancy between his prehearing statement and his testimony on this point during the hearing. Recollections may vary with time, and details not recalled at one time may be recalled at another. In this instance, based on his demeanor as a witness, I conclude that his testimony during the hearing was his most accurate and complete recollection of the signing of the agreement.

Among other factors I have considered in determining that Alderson's testimony during the hearing is reliable, there is no evidence of any benefit flowing to the Union regardless of whether the agreement was signed in 1985, as claimed by Alderson, rather than in 1986, as claimed by Durham, such as might have given Alderson a motive to falsify the date of

[17] The copy of the notice offered in evidence was obtained by the Respondent's wife from the Don Tripp Agency, Inc., Mansfield, Missouri. The Respondent stated that he did not remember receiving a copy of the notice in 1986. The notice was admitted in evidence by stipulation of the parties as R. Exh. 16.

signing of the agreement. The events which are the basis of the charge in this case allegedly occurred in 1987, which is after the date of signing claimed by either Alderson or Durham.

The Respondent's claim that even though he may have signed the agreement, he did not know it had been accepted by the Union, and, therefore, there was no acceptance of his offer and no contract, is unbelievable in light of his subsequent conduct.[18] Respondent admitted visiting the Union office on one or more occasions after he had signed the agreement to explain his difficulties in obtaining the bond and insurance coverage required by the agreement. It is obvious from his conduct that Durham thought there was an agreement in place; the suggestion that he did not know the Union's representative had also signed the contract, or that the Union was waiting for him to get the required insurance before signing the agreement, is ludicrous. There is no suggestion in the record that either the Respondent or the Union considered the agreement to be binding only if the Respondent succeeded in complying with the insurance and bond requirements contained in the agreement. James Alderson informed the Respondent that the bond requirement might be waived, but the Respondent never asked for a waiver. Linda Alderson gave the Respondent the name of bonding agency which might provide the Respondent with the bond required by the agreement, but the Respondent never contacted the agency. It is clear that the Respondent knew there was a binding agreement; he simply decided to ignore it.

As noted above, under principles announced by the Board in *John Deklewa & Sons*, supra, which are applicable retroactively, neither party to a 8(f) agreement may unilaterally repudiate the agreement during its term. Any attempt by the Respondent in this case to repudiate his agreement with the Union during the term of that agreement was of no effect.

Finally, I find no evidence that the Respondent violated the Act by dominating or interfering with the Union. There is no evidence suggesting that there was anything other than an arm's-length relationship between the Respondent and the Union. The Respondent, in fact, denied that he required anyone who worked on his jobs to join the Union, pay dues or initiation fees to the Union, or be referred through the Union hiring hall.

[18] Even if Respondent's signing of the agreement is construed as nothing more than an offer to enter into an agreement, it is well settled that an offer remains on the table unless withdrawn by the offeror, or circumstances arise which would lead the parties to believe the offer had been withdrawn. *Magic Chef, Inc.*, 288 NLRB 2 (1988). I find no evidence that the Respondent withdrew his offer, or that his conduct put the Union on notice that he had withdrawn the offer. Neither is there any evidence that the Respondent specified any particular manner or time of acceptance by the Union, such that it might be argued that his offer lapsed because the Union did not comply with the terms of the offer. To the contrary, the Union informed the Respondent that he could become a union contractor simply by signing the collective-bargaining agreement form which the Union provided. The offer to enter into a collective bargaining agreement actually in this case originated with the Union, which by presenting the Respondent with the form agreement indicated its offer to enter into a binding collective-bargaining relationship. Thus, arguably, there was a binding agreement when the Respondent returned the form agreement with his signature on it to the Union. In any event, I find that, based on the testimony of James Alderson, whom I find, based on his demeanor on the stand, to be a credible witness, a copy of the agreement bearing Alderson's signature was given to the Respondent.

c. *The 10(b) issue*

I find that the complaint in this case is not barred by Section 10(b) of the Act.

Section 10(b) of the Act provides:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

The Board has said that ''[i]t is well established that 'the 6-month limitations period prescribed by Section 10(b) does not begin to run on an alleged unfair labor practice until the person adversely affected is put on notice, actually or constructively, of the act constituting it.''' *Metromedia, Inc.-KMBC-TV*, 232 NLRB 486, 488 fn. 20 (1977). In the instant case, it is not disputed that the Union did not file a charge with the Board within 6 months after it first believed that the Respondent was not complying with the terms of the collective-bargaining agreement which he had signed on or about July 29, 1985. The Union and the Respondent agree that the Respondent made no payments to the Union's fringe benefits funds at any time after he signed the agreement. As early as June or July 1986, the Union was convinced that the Respondent was not complying with the collective-bargaining agreement, and on or about August 13, 1986, it picketed a job on which the Respondent was working because the Respondent had not made any payments to the Union's fringe benefit funds. The Union did not file its charge with the Board, however, until March 25, 1987, more than 8 months after the picketing, and even longer after it first believed that the Respondent was not complying with the agreement.

The Board has also said, however, that ''each failure to make contractually required monthly benefit fund payments constitute[s] a separate and distinct violation [of Section 8(a)(5)].'' *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980). Thus, each failure of the Respondent to make a contractually required benefit fund payment after September 27, 1986,[19] is a violation of the Act which is subject to the Board's remedial powers.

I find that there is credible evidence that during the 6 months period preceding the filing of the charge by the Union, the Respondent performed drywall finishing work which was covered by the collective-bargaining agreement which he signed, and that he failed to comply with the agreement with respect to this work by not paying his employees in accordance with the agreement and by failing to make the payments to the Union's fringe benefit funds as required by the agreement. Accordingly, I find that the charge filed by the Union was based on unfair labor practices occurring within 6 months of the filing of the charge.

d. *The employee vs. independent contractor issue*

I find that there is sufficient evidence to establish that at least some of the persons who worked on Respondent's drywall finishing jobs after September 25, 1986, were employees, as defined by the Act, and not independent contractors, as claimed by the Respondent. Included as employees

[19] The 6-month 10(b) period prior to the filing of the charge on March 25, 1987.

are Frank and Brad Dunbar, who the Respondent stated he tried to keep busy generally, and Timothy Huckin and James Amos, two drywall finishers who worked for Respondent for a brief period of time on the John Q. Hammons Trade Center job in Joplin Missouri. There is insufficient evidence in the record from which it can be determined whether others who worked for Respondent on his various jobs during the same period of time were employees or independent contractors.

Section 2(3) of the Act specifically excludes ''independent contractors'' from the definition of ''employees.'' In determining the employee-independent contractor issue, the Board applies the common law ''right of control'' test. *National Freight, Inc.*, 146 NLRB 144, 145–146 (1964).[20] More recently, the Board stated in *H & H Pretzel Co.*, 277 NLRB 1327, 1328 (1985):

> In determining the status of individuals alleged to be ''independent contractors,'' the Board applies a ''right of control'' test. If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished, the person who performs the services is an employee. If only the results are controlled, the person performing the is an independent contractor. *A. S. Abel Publishing Co.*, 270 NLRB 1200 (1984).[21]

In addition to applying the common law right-of-control test to determine whether individuals are employees or independent contractors, the Board has also said that ''for an independent contractor relationship to exist, the arrangement most typically should exhibit entrepreneurial or proprietary characteristics.'' *Roadway Package System*, 288 NLRB 196, 198 (1988).[22] Similarly, in determining employee or independent contractor status, the Ninth Circuit, in *Merchants Home Delivery Service v. NLRB*, 580 F.2d 966, 973 (9th Cir. 1978), also considered such other factors as (l) entrepreneurial aspects of the individual's business, (2) risk of loss and opportunity for profit, and (3) the individual's proprietary interest in his business. Factors found by the Board not to necessarily preclude employee status include authority to use or hire replacements and helpers, and the lack of wage withholdings or benefits accorded other employees. *Roadway Package System*, supra; *Mission Foods Corp.*, supra.

The collective-bargaining agreement which the Respondent signed required the Respondent, among other things, to deduct and pay social security taxes for all employees; pay employees according to an hourly scale contained in the agreement; contribute monthly to the Painters Local 203 Apprenticeship Training Fund an amount based upon a rate of five cents for each hour an employee receives pay; and contribute to the Union's Health and Welfare Fund on a monthly basis at a rate specified in the agreement for each hour or portion thereof that an employee receives pay.

The Respondent and his wife, Sandra Durham, who keeps her husband's business records, claim that all of the persons who work for J & S Drywall are subcontractors. Nothing is withheld from their pay by J & S Drywall, and, according to Sandra Durham, she files for each person or entity who does work for J & S Drywall an IRS Form 1099-MISC, declaring the money which they received from J & S Drywall to be ''nonemployee compensation.'' Placed in evidence by the Respondent are copies of IRS Form 1099-MISC (Miscellaneous Income), for the year 1986, identifying ''J & S Drywall/Jerry C. Durham'' as the payer, and the following individuals as recipients of the ''nonemployee compensation'' shown:

Frank Dunbar	$2,016.50
Thomas G. Durham	1,862.92
Fred Nelson	3,259.00
Brad Dunbar	9,463.50
Bill Mundun[23]	1,200.00
John Ryan	946.99

Respondent's check journal for all or parts of the months from September 1986 to April 1987, contains records of numerous checks to various payees, described as being for subcontractor labor. According to the Respondent, those checks were used to pay for his ''subcontract labor.'' The Respondent stated that he usually paid for labor on completion of the job; however, on longer jobs, he paid for labor on a weekly basis. The most frequent recipients of subcontract labor checks were Brad Dunbar, Frank Dunbar, and John Ryan Drywall. During the period from September 12, 1986, to April 4, 1987, 21 checks were issued to Brad Dunbar. During the period from November 14, 1986, to April 10, 1987, 17 checks were issued to Frank Dunbar. And, during the period from December 5, 1986, to March 27, 1987, 10 checks were issued to John Ryan Drywall. Names appearing less frequently in Respondent's records as subcontractors include Fred Nelson and Bill Munden.[24]

The Respondent testified that he started on the Holiday Inn construction job in March 1987, as a subcontractor of Ozark Interiors. Respondent stated that he had 10–12 workers on the job, but that he identified some of them only by the name of the subcontractor who sent them. Initially, he used several workers sent by his brother, Ron Durham, and he put Frank Dunbar to work on the job. According to Durham, he took the workers to the areas which they were to do, pointed out where the supplies were and other things they should notice, such as the fact that the ceiling were 8 feet 6 inches, not the standard 8 foot ceilings, and that the drywall had to be finished all the way to the floor, not to within 2 inches from the floor, as is the normal procedure. The Respondent stated that on the floors he worked on, he told each worker where to work; on the other floors, the workers did the work however they chose.[25]

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[20] In applying the ''right of control test,'' the Board said:

> If the recipient of the services in question has a right to control not only the end to be achieved but also the means to be used in reaching such result, an employer relationship exists as a matter of law; otherwise there exists an independent contractor relationship. The application of this principle is not a mechanical one in any case, but requires a careful balancing of all factors bearing on the relationship. [146 NLRB at 145–146.]

[21] The Board also said in *A. S. Abel Publishing Co.*, 270 NLRB at 1202, that ''[i]ts determination of which type of control is retained by the alleged employer turns on the particular facts of each case.''

[22] Citing *Mission Foods Corp.*, 280 NLRB 251 (1986).

[23] Also spelled ''Munden'' in other records prepared or maintained by Respondent.

[24] Tim Huckin received checks for labor on December 15, 19, and 24, 1986. James Amos was paid for labor on December 20 and 21, 1986.

[25] The Respondent stated that he told Frank Dunbar to install the corner bead first, in the manner which he had told Frank and Brad Dunbar that he preferred. The Respondent said that Frank Dunbar had been trained in drywall finishing by his brother, Brad Dunbar.

On the Holiday Inn job, Respondent said, he inspected the work performed by J & S Drywall's workers, and if the work was not satisfactory, he sent the worker who had performed it back to do it over again. One worker hired by Respondent to work on the Holiday Inn job was John Savage, who came on the jobsite and asked for work.[26] Respondent stated that after sending Savage back twice to repair faulty workmanship, and the work still was not satisfactory, he did the work himself, and told Savage he was no longer needed on the job.

Describing his normal procedures, Respondent said that he measures the job and tells his subcontractors how much he will pay for the work. Respondent said that he writes the measurements on scratch paper, but also tells the subcontractors to measure it for themselves. Respondent said that if he has two or more people working on the same wall, they would be part of a crew provided by a subcontractor, and it would be up to the subcontractor to pay his people.

According to the Respondent, for some jobs, he calls people he knows are capable of doing the work. Respondent stated that he normally uses Frank or Brad Dunbar, and John Ryan Drywall. Respondent stated that he tries to keep them busy. Respondent described Brad Dunbar as one of his most regular workers since the fall of 1986. He testified that he would like to keep John Ryan busier, but cannot, and that he only uses Fred Nelson, who has more people working for him, when J & S Drywall is behind on a job. The Respondent stated that he used Bill Munden occasionally during late 1986 and early 1987.[27]

Respondent testified that he gave Brad Dunbar a bonus in January 1987. He said that he did not believe he gave bonuses to Frank Dunbar or John Ryan. Respondent said that he raised the hourly pay of Brad Dunbar and Frank Dunbar. According to the Respondent, Brad and Frank Dunbar are paid by the hour when they do fill in work, or by the square foot, when they do jobs which they can complete by themselves.[28] John Ryan is usually paid by the square foot; he seldom is paid by the hour.

According to the Respondent, one project upon which Brad and Frank Durham, and John Ryan worked was the John Q. Hammons Trade Center in Joplin, Missouri. Respondent said he inspected their work twice a week, and found no quality problems.

Frank Dunbar testified that he has worked for J & S Drywall for about a year. He stated that he had not done drywall work before that, and that he learned the trade by working with Jerry Durham, but mostly by working with his twin brother, Brad Dunbar. Dunbar stated that when he worked with Jerry Durham, the latter showed him how to do drywall finishing work, and explained how he liked his jobs to be done, saying he wanted Dunbar to do it that way. Dunbar said that Jerry Durham tells him when a job has to be finished, and that he starts the job enough in advance to meet the completion date. He stated that Jerry Durham tells him which jobs have priority, and that on occasion Durham has told him to leave one job and go to another. Dunbar stated that he is paid by the hour. He said that he started working for J & 5 Drywall at $5 per hour, but that Durham later decided he needed a raise, without Dunbar asking for one, and increased his pay to $6 per hour. Dunbar said he submits his hours to J & S Drywall, and that J & S Drywall does not withhold anything from his pay for income tax, social security, or unemployment compensation. Dunbar said that he averages 20 hours a week doing drywall finishing. Dunbar said that he and his brother work as a team, and call themselves ''Mud Dobbers, Inc.,'' even though they are not incorporated. He stated that he and his brother have done drywall finishing work for people other than Jerry Durham.

Timothy Huckin testified that he is a drywall finisher, and that he worked for Jerry Durham on the John Q. Hammons Trade Center job in Joplin, Missouri, for several weeks in late 1986.[29] Huckin said that Jerry Durham called him, and asked him if he wanted work. Huckin said that he met Durham at the job site, and that Durham showed him what had to be done, and where to get water and materials (tape and joint compound, called ''mud''). Huckin said that he brought his own tools, and that Durham furnished the scaffolding and ''Ames tools,'' a brand of tools which eliminate much of the handwork in finishing drywall and make it possible to do the work faster. Huckin said that it was not necessary for Durham to show him how to do the work, as it was expected that he already knew how to finish drywall. Huckin said that Durham had other people working on the job, and that one of them, who Huckin thought was Durham's foreman, told him to take his lunchbreak at 12 noon. In addition, Huckin said, he took a couple of breaks at other times during the day. Huckin said that he was paid $10 per hour, and that he kept track of the time he worked. He said he was paid every Friday.

James Amos, a drywall finisher, testified that he worked for J & S Drywall or Jerry Durham on the John Q. Hammons Trade Center job for a day or two on a weekend in late 1986.[30] He stated that he is a member of Painters Local 203, and that he is a friend of Tim Huckin. Amos said that he had a regular job at the time, and may have found out from Huckin about the availability of extra work at the Trade Center. He said he went to the Trade Center, where he talked to Jerry Durham, who confirmed that he was behind schedule on the job and needed help. Huckin and others were working for Durham on the job. Amos said that Durham showed him the area he was to work on. Amos supplied his own tools; the materials were on the job. Huckin was paid $10 per hour for his work, and received his pay by check from J & S Drywall. Amos said he was told when it was breaktime, and when it was time for dinner. According

[26] According to Respondent, 80 percent of his workers are hired that way. According to Respondent, when people ask for work, he asks them if they have their own tools, tells them what the work will pay, and if that is satisfactory, shows them where to work.

[27] Respondent said he did not recognize the names of Tim Huckin or James Amos.

[28] Elaborating on the basis upon which he pays Brad Dunbar, whom Respondent described as an average but trustworthy worker and personal friend, Respondent said that Brad Dunbar works on a cost plus basis when it is doubtful that he can make a decent wage on a per-square-foot basis. Respondent said that if Brad Dunbar tried to do a job on a per square foot basis, but did not make any money, he changed Dunbar's pay to a cost plus basis. According to Respondent, he will not let Dunbar work for nothing, and does whatever it takes for him to make money. The Respondent said that Brad Dunbar is a college student, and works for J & S Drywall 20 to 30 hours a week.

[29] Respondent's records show that Timothy Huckin received checks for ''subcontract labor'' dated December 12, 1986 ($240), December 19, 1986 ($510), and December 24, 1986 ($385).

[30] Respondent's records show that checks for ''subcontract labor'' were issued to James Amos on December 20, 1986 ($80), and December 21, 1986 ($40).

to Amos, all of the crews on the job (electricians, plumbers) pretty much took lunch and breaks at the same time. Amos said that Durham may have told him when it was breaktime in the afternoon. Amos said he was already qualified to perform the work, and did not need training. Amos said that he assumed the job was nonunion, and that no deductions were taken from his pay. He said that he knew the Union's constitution prohibited members from working for nonunion contractors.

It is clear from the evidence that Brad and Frank Dunbar, Timothy Huckin, and James Amos were employees of the Respondent within the meaning of the Act. During the period of time beginning 6 months before the charge was filed, each of these individuals worked for the Respondent for an hourly wage, although the Respondent claimed he sometimes paid Brad Dunbar on a per square foot of work basis. They had no entrepreneurial or proprietary interest in the Respondent's business, and bore none of the risk of profit or loss. When they worked for the Respondent, the Respondent told them where to work, set the priorities on the job, and inspected their work. It was the Respondent's practice to have workmen correct their own mistakes or repair unsatisfactory (in the Respondent's sole judgment) work. In the case of Brad and Frank Dunbar, the Respondent played a major role in training them how to finish drywall, and undertook to make sure that they earned sufficient money by increasing their hourly rate of pay, and, with respect to Brad Dunbar, giving him a bonus and converting his rate of pay to a cost plus basis when he was not making sufficient profit, in Respondent's judgment, on a per-square-foot basis. When he was paying workmen by the hour, the Respondent expected that they would work steadily at a satisfactory, to him, rate of progress. In the case of Timothy Huckin and James Amos, the Respondent, or his representative, established the time for lunch and breaks. Overall, as concerned these individuals, Respondent exercised not only the right to control the results of the services which they performed for him, but the manner and means by which these individuals performed the services he assigned to them. Under the right-of-control test, these individuals were employees of the Respondent, not independent contractors.

It may well be that others who worked for Respondent during the relevant period of time were also employees, under the right-of-control test, and not independent contractors. However, there is insufficient evidence in the record concerning the conditions under which they worked for Respondent, and the extent of control he exercised over the manner and means by which they performed work for him, to preclude the possibility that they were bona fide independent subcontractors, or employees of bona fide independent subcontractors, performing work for the Respondent. As to these individuals, to the extent they can be identified from the record in this case, I find that the General Counsel has failed to meet the burden of proving by a preponderance of the evidence that they were employees.

CONCLUSIONS OF LAW

1. Respondent, Jerry Durham Drywall, d/b/a J & S Drywall, a sole proprietorship owned by Jerry Durham, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Painters and Allied Trades, Local 203, is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about September 27, 1986, in violation of Section 8(a)(1) and (5) of the Act, Respondent has failed and refused to abide by, and continue in full force and effect, all of the terms of the collective-bargaining agreement into which the Respondent entered with the International Brotherhood of Painters and Allied Trades, Local 203 (the Union), on July 29, 1985, and which, by its terms, did not expire until March 31, 1987, specifically:

(a) Since on or about September 27, 1986, and throughout the period covered by the collective-bargaining agreement, Brad Dunbar was an employee of the Respondent, within the meaning of the Act, and a member of the collective-bargaining unit for which the Union was the exclusive collective-bargaining representative under the collective-bargain agreement which the Respondent and the Union signed on or about July 29, 1985.

(b) Since on or about September 27, 1986, and throughout the period covered by the collective-bargaining agreement, Frank Dunbar was an employee of the Respondent, within the meaning of the Act, and a member of the collective-bargaining unit for which the Union was exclusive bargaining representative under the collective-bargaining agreement which the Respondent and the Union signed on or about July 29, 1985.

(c) Since on or about mid-December 1986, until their employment by the Respondent terminated, Timothy Huckin and James Amos were employees of the Respondent, within the meaning of the Act, and were members of the collective-bargaining unit for which the Union was the exclusive bargaining representative under the collective-bargaining with the Respondent and Union signed on or about July 29, 1985.

(d) Since on or about September 27, 1986, in violation of Section 8(a)(1) and (5) of the Act, the Respondent has failed to deduct and social security taxes for its employees, as specified in the collective-bargaining agreement of on or about July 29, 1985; failed to pay its employees according to the hourly scale (wage) specified in the collective-bargaining agreement; failed to contribute monthly the amount specified in the collective-bargaining agreement to the Union's Apprenticeship Training Fund; and, failed to contribute monthly the amount specified in the collective-bargaining agreement to the Union's health and welfare fund.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section (2)(6) and (7) of the Act.[31]

REMEDY

Having found that the Respondent, Jerry Durham Drywall, d/b/a J & 5 Drywall, a sole proprietorship owned by Jerry Durham, has engaged in certain unfair labor practices, I find

[31] I reject General Counsel's request for a visitorial clause, whether it be broad or narrow in scope. Such clauses are not routinely included in the Board's orders. In this case, there are no grounds for issuance of either type of visitorial clause. The record does not show there to be any basis for a broad visitorial clause, such as a likelihood that the Respondent would fail to cooperate or otherwise seek to evade compliance with any order the Board should issue in this case. Nor is there any basis for including a narrow visitorial clause. There is no question in this case concerning how and by whom compliance with any order of the Board is to be effected. (See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988); *299 Lincoln Street, Inc.*, 292 NLRB 172 (1988).)

that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, shall be ordered to cease and desist from engaging in these unfair labor practices.

Respondent, having violated Section 8(a)(1) and (5) of the Act, failing to comply with the provisions of the collective-bargaining agreement into which it entered with the Union on or about July 29, 1985, shall be required to comply with all provisions of the agreement, as they affect the Respondent's employees and the Union, and shall make whole the employees for any loss of earnings, and the Union for any losses of contributions to its Apprenticeship Training Fund and Health and Welfare Fund, during the period from September 27, 1986, until March 31, 1987, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[32]

[Recommended Order omitted from publication.]

[32] In accordance with the Board's decision in *New Horizons for the Retarded*, supra, interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. Section 622. Interest on amounts accrued prior to January 1, 1987, the effective date of the amendments to 26 U.S.C. § 6221, shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).